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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Interest of the Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 200,000 members. The American Civil Liberties Union Fund of the National Capital Area is the Washington, D.C. area litigation branch of the ACLU. For more than sixty years,

the ACLU has been dedicated to the protection of constitutional rights.

This case raises significant constitutional issues of separation of powers and the extent to which Congress can foreclose judicial review of questions of law affecting significant individual interests. The ACLU submits this brief to assist the court in the resolution of these issues.*/

SUMMARY OF ARGUMENT

Chapter 77 of the Civil Service Reform Act (CSRA) provides for judicial review of final agency actions.1/ Section

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*/ The parties have consented to the filing of this brief amicus curiae. The letters of consent have been lodged with the Clerk of this Court.

1/ 5 U.S.C. § 7703. This provision must be read in conjunction with the overall statutory framework of the Administrative Procedure Act (APA), by which Congress created the executive agencies, provided for their operation and sought to maintain the separation of powers and the integrity

(footnote continued)

8347 of the Civil Service Retirement Act, characterizes determinations by the Office of Personnel Management in the distribution of disability and retirement benefits as "final and conclusive . . . and not subject to review."[2/] The Court of Claims, which prior to creation of the Federal Circuit had jurisdiction over appeals of the denials of retirement and disability payments,[3/] read the two provisions to provide judicial review under a narrow

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1/ (continued)
of an independent judiciary. The APA allows judicial review for any individual "aggrieved by agency action." 5 U.S.C. § 702. The congressional policy embodied in the APA must be brought to bear in any discussion of executive agencies, since the APA provides the general framework for the operation of all agencies.

2/ 5 U.S.C. § 8347(c). The Civil Service Retirement Act constitutes the portion of the CSRA which governs retirement and disability benefits.

3/ Appeals are taken from final decisions of the Merit Systems Protection Board. 5 U.S.C. § 7703.

set of circumstances involving an error going to the "heart of the administrative determination," such as a "misconstruction of the governing legislation" or a "substantial departure from important procedural rights."[4/] The Court made this determination notwithstanding the preclusive language of Section 8347.

In 1980 Congress amended Section 8347, however, to address evidence of agency abuse such as increased incidences of agency-initiated retirement for "problem" employees.[5/] The amendment, sub-

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4/ Scroggins v. United States, 397 F.2d 295 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968). See also McGlasson v. United States, 397 F.2d 303 (Ct. Cl. 1968), decided the same day as Scroggins; Fancher v. United States, 588 F.2d 803 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385 (Ct. Cl. 1980). The standard has its origins in earlier cases. See Gaines v. United States, 158 Ct. Cl. 497 (1961), cert. denied, 371 U.S. 936 (1962); Smith v. Dulles, 236 F.2d 739 (D.C. Cir. 1956).

5/ S. Rep. No. 96-1004, 96th Cong., 2d Sess. reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

section (d), expressly allows judicial review of involuntary retirement cases pursuant to Section 7703 of the CSRA. At the time of the amendment, jurisdiction to hear the appeals of the denial of the payments was vested in the several federal courts of appeals. Several circuits continued to grant review in voluntary retirement cases pursuant to the Scroggins standard.[6/] A split in the circuits developed, however, when some circuits denied review.[7/]

In 1982, the Court of Appeals for the Federal Circuit was created and given

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6/ See Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F.2d 1499 (D.C. Cir. 1983).

7/ See Campbell v. Office of Personnel Management, 694 F.2d 305 (3d Cir. 1982); Chase v. Office of Personnel Management, 695 F.2d 790 (4th Cir. 1982); Morgan v. Office of Personnel Management, 675 F.2d 196 (8th Cir. 1982).

exclusive jurisdiction over these appeals.[8/] That court held, in Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983), that because of the finality language of Section 8347, it had no jurisdiction to review the appeal of the denial of Mr. Lindahl's disability annuity. This Court should reverse that decision for a number of reasons.

First, Congress did not intend to preclude all judicial review of all voluntary retirement cases when it amended Section 8347. The statutory framework of the Administrative Procedure Act and the Civil Service Reform Act expressly defers to the doctrine of separation of powers.[9/] The judicial interpretation of the

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8/ 28 U.S.C.A. § 1295 (a)(9) (West. Supp. 1983).

9/ This is embodied in the standard for review set out in the APA (5 U.S.C. § 706) and the CSRA (5 U.S.C. § 7703).

conflict created by Section 8347, found in the Scroggins line of cases, also respects the fact that the federal system cannot function justly and efficiently without allowing review of errors of law committed by the executive.[10/] In fact, principles of statutory construction mandate the conclusion that Section 8347 must be read to provide for judicial review.[11/]

Second, Congress could not have written Section 8347 to preclude all judicial review, since it cannot divest the judiciary of its power to review errors of law and adjudicate significant individual rights.[12/] The doctrine of separation of

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10/ See, e.g., Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982).

11/ For example, this court has established a presumption in favor of reviewability. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

12/ See Stark v. Wickard, 321 U.S. 288 (1944); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

powers seeks to preserve independent functions for each of the branches. Congress cannot now vest the executive with the power to make unchecked determinations in areas typically reserved for the judiciary to review.[13/]

Finally, retirement benefits are significant rights, the denial of which must not be immune from review.[14/] Federal employees must have the option to seek judicial review to prevent unlawful denial of their rights to a disability or retirement annuity. The structure of the federal system and the separation of powers doctrine plays a critical role in providing this protection. Accordingly,

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13/ See Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S.Ct. 2858 (1982).

14/ See American Postal Workers Union, v. United States Postal Service, 707 F.2d 548, 554 (D.C. Cir. 1983).

Amicus respectfully urges that this Court reverse the decision of the Court of Appeals for the Federal Circuit.

ARGUMENT

The principle of separation of powers is at the heart of the American experiment in self-government. Drawing on the political theory of Locke[15/] and Montesquieu,[16/] the Founders carefully divided the functions of government into three categories: (1) the making of new rules of law; (2) the implementation of existing rules of law; and (3) the resolution of disputes over the applicability, meaning

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15/ J. Locke, The Second Treatise of Government, reprinted in Two Treatises of Government (P. Laslett 2d ed. 1967).

16/ C. Montesquieu, The Spirit of the Laws (T. Nugent Trans. 1949).

and effect of law.[17] The law-making function was vested by Article I in the legislative; the implementation function by Article II in the executive; and the law-declaring function by Article III in the judiciary.[18]

Two distinct policies are advanced by separation of powers. First, by dividing the functions of government among three separate clusters of officials, the Founders sought to prevent a concentration of power which might threaten individual liberty. The Federalist No. 47 (J. Madison). Scarcely less important, the

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17/ See generally, M. Vile, Constitutionalism and the Separation of Powers (1967); W. Gwynn, The Meaning of the Separation of Powers (1965).

18/ See generally, Sharp, The Classical Doctrine of American Separation of Powers, 2 U. Chi. L. Rev. 385 (1934-35); Neuborne, Judicial Review and Separation of Powers in France and the United States, 57 N.Y.U. L. Rev. 363 (1982).

Founders believed that by parcelling the functions of government to organs specially designed to perform them, the government's capacity to operate efficiently and justly would be enhanced.[19/]

This Court has consistently recognized that one of its most significant constitutional resporsibilities is to serve as defender of the principle of separation of powers. Thus, when the executive branch has sought to exercise the law-making function vested by Article I in the legislature, this Court has firmly rebuffed it. See, e.g., Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579 (1952); see also,

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19/ Justice Irving R. Kaufman has detailed the origins and development of our independent judiciary. See Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980). He demonstrates that unless the court can act as a separate institution and retain its traditional function, it cannot operate efficiently within the federal system. Id. at 687-700.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Hynes v. Borough of Oradell, 425 U.S. 610 (1976); F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979).

Similarly, when Congress has sought to exercise the implementation function vested by Article II in the executive branch, this Court has firmly rebuffed it. See, e.g., Buckley v. Valeo, 424 U.S.1, 120-146 (1976); I.N.S. v. Chadha, 103 S. Ct. 2764 (1983); Springer v. Phillipine Islands, 277 U.S. 189 (1926); cf., Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Finally, when either branch has threatened the judicial function, this Court has staunchly defended the concept of an independent judiciary. E.g., Northern Pipeline Constr. Co. v. Marathon Pipe-

line Co., 102 S.Ct. 2858 (1982); United States v. Nixon, 418 U.S. 683, 702 (1974); I.N.S. v. Chadha, 103 S. Ct. 2764, 2789 (1983) (Powell, J. concurring); United States v. Lovett, 328 U.S. 303 (1946); see also, Crowell v. Benson, 285 U.S. 22 (1932); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); cf. United States. v. Klein, 80 U.S. (13 Wall.) 128 (1871).

In this case, the Court of Appeals for the Federal Circuit has construed Section 8347 of the Civil Service Retirement Act, 5 U.S.C. § 8347, to preclude all judicial review of decisions of the Merit Systems Protection Board denying disability payments to federal employees who have voluntarily retired from federal service. This necessarily includes precluding review of alleged errors of law in construing and administering the governing statutes.

Such a construction of Section 8347 is doubly violative of separation of powers principles. First, it vests total power over legal questions affecting the administration of a congressional program of vital importance to individuals in the executive branch. This violates the prophylactic principle of power-sharing which is at the core of out tripartite plan of government. Second, it vests the final power to declare the meaning of a congressional statute in an executive official who lacks the functional expertise and independence of a judicial officer.20/

The two issues raised by this case, therefore, are, first, whether Congress,

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20/ These two concerns address the need to maintain the integrity of an independent judiciary. Id. at 687-701. "The essence of judicial independence . . . is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality." Id. at 688.

in enacting Section 8347, intended to violate basic separation of powers principles by vesting unreviewable power to declare the meaning of a Congressional statute in the executive branch; and, second, whether such an attempt to vest a classic judicial function solely in the executive branch would be constitutional.

As Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S.Ct. 2858 (1982), makes clear, the constitution places limits on Congress' power to allocate the judicial function to non-judicial organs. In Northern Pipeline, Congress' attempt to vest an Article I bankruptcy judge with Article III responsibilities was deemed violative of separation of powers principles. In this case, the construction of Section 8347 espoused by the court below does not merely seek to use Article I judges to perform Article III functions, as in Northern Pipeline, it

seeks to eliminate the judicial function altogether by vesting the unreviewable power to declare the law on an executive official. Thus, unlike Palmore v. United States, 411 U.S. 389 (1973), where the judicial function was vested in an Article I judge possessing both the separate status and functional advantage of the judicial branch, the court below has construed Section 8347 as vesting the final law-declaring function in an executive official possessing neither separate status nor judicial expertise.21/

Given the central role played by the separation of powers in our governmental

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21/ Thus, this case does not raise the question of the degree to which Congress may vest the law-declaring function in an Article I as opposed to an Article III Court; but rather whether Congress may eliminate the judicial role in the law-declaring function altogether. See Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

structure, Congressional attempts to exclude the judiciary from any role in reviewing errors of law committed by executive officials during the administration of a Congressional program are extremely rare.[22/] Although the issue has never been decided, this Court has repeatedly recognized that any attempt to oust an Article III judiciary from the power to review constitutional questions involving the administration of a congressional program would raise profound constitutional questions. E.g., Crowell v. Benson, 285 U.S. 22 (1932), St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Johnson v. Robison, 415 U.S. 361 (1974).

22/ In United States v. Erika, 456 U.S. 201 (1982), this Court ruled that Congress had not authorized judicial review

(footnote continued)

Similarly, an attempt to prevent the judiciary - whether Article I or Article III - from reviewing non-constitutional errors of law committed by executive officials during the administration of a Congressional program would be unconstitutional.[23/]

22/ (continued)
of predominantly factual determinations by private insurance carriers of the amounts of certain categories of Medicare reimbursements. Unlike the present case, questions of law involving eligibility for Medicare reimbursement were fully reviewable in Erika. The Court explicitly declined to consider whether even the limited denial of judicial review at issue in Erika violated the Constitution. Id. at 206 n.5.

In Johnson v. Robison, 415 U.S. 361 (1974), the Court narrowly construed a limitation on judicial review of denials of Veteran's Benefits to avoid constitutional questions and permitted challenges to the constitutionality of the program. No question was raised as to the reviewability of non-constitutional issues of law. See also, Oesterich v. Selective Service System, 393 U.S. 233, 240 (1968) (Harlan, J., concurring).

23/ No question exists as to the power of an Article III court to pass on the con-

(footnote continued)

However, before considering whether Congress may oust the courts from the power to review errors of law committed by executive officials, the question of whether Congress has actually attempted to do so must be considered.

23/ (continued)
stitutionality of Section 8347. As Professor Hart has noted, Article III courts may utilize available bases of general jurisdiction to evaluate the constitutionality of selective attempts to restrict judicial review. Hart, The Power of Congress to Limit the Jurisdiction of the General Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1374-83, 1386-1402 (1953); Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778, 783, n.36 (1984). Following this Court's reasoning in Johnson v. Robison, 415 U.S. 361 (1974), section 8347 cannot be read to eliminate judicial power to review constitutional questions, including the question of the constitutionality of eliminating review of all non-constitutional questions of law.

I. CONGRESS HAS NOT ATTEMPTED TO PRECLUDE JUDICIAL REVIEW OF ERRORS OF LAW COMMITTED BY THE MERIT SYSTEMS PROTECTION BOARD.

A. The Relevant Statutory Framework Embodies The Doctrine of Separation Of Powers.

In 1946, Congress enacted the Administrative Procedure Act (APA) in order to establish a cogent structure in which agencies could operate effectively and efficiently. See 5 U.S.C. §§ 551-706. Chapter seven of that Act provides for judicial review of final agency actions and explicitly controls all agencies unless otherwise specified by statute.[24/] The APA thus represents the framework through which Congress specified procedures for all executive agencies.

In 1978, Congress enacted the Civil Service Reform Act (CSRA) to preserve the merit system in the Federal workforce and

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24/ 5 U.S.C. § 701(a)(1).

protect federal employees and their statutorily created rights from infringement by their employer agency. See 5 U.S.C. §§ 1101-8913. Section 7703 of this Act provides for judicial review of final decisions of the MSPB. The Civil Service Retirement Act constitutes the portion of the CSRA which governs the distribution of retirement and disability annuities to federal employees. See 5 U.S.C. §§ 8331-8348. Section 8347, the provision at issue, characterizes determinations by the Office of Personnel Management as "final and conclusive."[25/] Notwithstanding that language, the Court of Claims read Sections 7703 and 8347 as carving out a narrow set of circumstances under which it would be proper to reverse the agency's

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25/ 5 U.S.C. § 8347(c).

determination.[26/] This decision became known as the Scroggins standard of review. In 1980, Congress sought to liberalize for a specific class of cases the narrow judicial review granted by Scroggins and thus added subsection (d) to Section 8347.[27/] It would be an ironic misinterpretation of Congressional intent to now read that

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26/ See Scroggins v. United States, 397 F.2d 303 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968).

27/ Congress granted judicial review pursuant to 5 U.S.C. § 7703 in cases where an individual was involuntarily retired by his or her agency based on mental condition. The amendment was prompted by evidence of agency abuse. "Allegations of increased use of such procedures to force unproductive or otherwise problem employees out of active service are considered to be serious by the committee and increased protection of employee rights is needed." S. Rep. No. 96-1004, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

amendment as cutting off all other judicial review.[28/]

The Administrative Procedure Act recognizes that the executive may not wholly displace the law-declaring function of the judiciary and thus provides judicial review for those individuals who are "aggrieved by agency action." 5 U.S.C. § 702. The legislative history behind this provision evidences a bias in favor of granting review:

> Very rarely do statutes preclude judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope

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28/ In fact, prior to creation of the Federal Circuit, several circuits did not so view Section 8347, but continued to grant review pursuant to Scroggins: see, e.g., Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F.2d 1499 (D.C. Cir. 1983).

> of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 212 (1946).

Scholars have validated the Congressional scheme and noted that it is axiomatic that an agency's exercise of its power cannot go unchecked. Professor Jaffe characterizes the requirement of judicial review as "the necessary premise of legal validity." L. Jaffe, Judicial Control of Administrative Action 321 (1965). Availability of review is one of the "psychological assumptions which support our system in which we turn to the judiciary for

protection against executive abuse." Id. at 324.29/

Congress thus devised a structure which would permit federal agencies to function effectively and efficiently and yet not exclude the judiciary. The scheme recognized the role of an independent judiciary, which

> traditionally exercised a reviewing function to ensure executive compliance with the applicable public law, policing executive officer's obedience to legisla-

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29/ Raoul Berger has gone further and stated that this "protection" rises to the level of a constitutional right. Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 56, (1965). He draws this conclusion from three sources: "(1) the implications of the delegation of powers; (2) due process; and (3) the creation of the court for the purpose, among others, of protecting the people from governmental excesses." Id. at 88-89. Final review by a court thus provides a shield against a variety of arbitrary actions taken by agencies, such as an "action which is unsupported by evidence or one which "turns on [the] failure to consider relevant evidence." Id. at 83.

> tive commands and providing a further set of internal checks on governmental power used against the citizenry.

S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 438 (1979). The congressionally established standard of review embodied in the Administrative Procedure Act permits agencies and the courts to coordinate their tasks to afford efficient government and effective protection for individual rights.

That standard, 5 U.S.C. § 706 of the Administrative Procedure Act, is also reflected in 5 U.S.C. § 7703 of the Civil Service Reform Act. Both standards are intended to be deferential in order to preserve the integrity of an agency's fact-finding. Thus, trial de novo is not permitted; only a second look at the administrative record is authorized. See

Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973).[30]

This Court has construed the standard of review to include a two-part test. First, a reviewing court must determine the scope of the agency's authority and whether the decisionmaker acted within his purview.[31] Second, the court must investigate the facts supporting the agency's decision and "consider whether the decision was based on a consideration of the relevant factors and whether there has

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30/ In fact, the legislative history of the Administrative Procedure Act explicitly states that Congress wished the court to be confined in its review to the agency record. S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 83 (1946).

31/ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

been a clear error of judgment."[32/]

The legislative history of the Civil Service Reform Act reinforces this standard of judicial review. The Merit Systems Protection Board is empowered to make the relevant factual findings. Its findings are conclusive if supported by substantial evidence in the administrative record. Agency actions may be reversed by the judiciary, however, if the procedures followed were in error and "substantially impaired the right of the employees." S. Rep. No. 95-969, 95th Cong., 2d. Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 2784.

The statutory standard is gracefully consistent with the goal of the separation of powers. To permit trial de novo would subvert the purpose of creating agencies

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32/ Id.

with expertise to make factual determinations. But to preclude all review would be tantamount to withdrawing the basic power of the courts to decide conclusively questions of law and individual rights. Thus, reversals of agency decisions are only proper if an employee's legal rights have been impaired. Indeed, this Court has recognized that it is empowered to protect rights granted by Congress when they have been vitiated by arbitrary agency action. See Leedom v. Kyne, 358 U.S. 184, 192 (1958).

B. The Scroggins Standard Respects The Requirement Of Judicial Review.

The Scroggins standard of review under Section 8347, allowed judicial review only in cases

> when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error

> going to the heart of the administrative determination.33/

The finality language of that section was seen as "a special and unusual restriction on judicial examination, and under it, courts are not free to review . . . retirement decisions as they would be if the 'finality' clause were not there."34/ This standard remains true to the scheme envisioned by the Constitution; agencies are free to exercise their expertise in making factual determinations, yet courts are free to review those decisions to ensure that the agency acted

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33/ Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968). The standard has its origins in earlier cases. See Gaines v. United States, 158 Ct. Cl. 497, 502 (1961), cert. denied, 371 U.S. 936 (1962); Smith v. Dulles, 236 F.2d 739, 742 (D.C. Cir. 1956).

34/ 397 F.2d at 297.

within its authority and did not infringe on individual rights.

When Congress amended Section 8347 in 1980 to expressly allow expanded review in a narrow class of cases involving involuntary retirement, courts were faced with the difficulty of reconciling the change with the narrow review which had previously been accorded claimants under the Scroggins standard.[35/] Many courts

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35/ The amendment added subsection (d) to 5 U.S.C. § 8347. That section reads, in pertinent part:

> In the case of any individual found by the Board to be disabled in whole or in part on the basis of the individual's application by an agency for purposes of disability retirement under section 9337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

continued to permit review, and posited an interpretation for the amendment which is consistent with both separation of powers principles and the Administrative Procedure Act.[36/]

For example, the court in McCard v. Merit Systems Protection Board, 702 F.2d 978, 982 (11th Cir. 1983), pointed out that since the legislative reports accompanying the amendment were scant,[37/] there was no "clear and convincing" evidence as required by the Administrative Procedure Act that Congress intended to bar judicial

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36/ See, Parodi v. Merit Systems Protection Board, 690 F. 2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F. 2d 1499 (D.C. Cir. 1983).

37/ The amendment was prompted by evidence of agency abuse, i.e., excessive "agency-initiated involuntary disability retirements for reasons of mental competency." S. Rep. No. 96-1004, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

review.[38/] Rather than permit review in only one class of case, the court in McCard concluded that the better approach would be to reaffirm the narrow review which had previously been authorized under the Scroggins standard and permit full de novo review under Section 7703 for involuntary retirement disputes. This interpretation respects the role of the judiciary and reconciles 5 U.S.C. § 7703 with 5 U.S.C. § 8347.

C. The Court Should Not Read The Amendment To Section 8347 As A Bar To Judicial Review.

A close review of the hearings concerning the 1980 amendment to Section 8347

38/ 5 U.S.C. § 701(a)(1) authorizes judicial review to be "precluded by statute." The legislative history of the Administrative Procedure Act explicitly states that such preclusion is only valid if there is "clear and convincing evidence" that it was Congress' intention to disallow judicial review. S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 275 (1946).

reveals that Congress intended to preclude review only of the factual findings of the Merit System Protection Board. The testimony acknowledges that this would not wholly bar judicial review since

> the courts already may review questions of procedure as distinguished from questions of fact concerning the disability itself, and employees are, therefore, not entirely precluded from obtaining judicial review.39/

The hearings also discussed the "present ban" on judicial review of involuntary retirements based on an employees' mental condition40/, referring to the Scroggins standard. The amendment thus merely removes the ban to full de

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39/ Hearing Before the Subcomm. on Compensation & Employee Benefits of the Comm. on Post Office & Civil Serv., 95th Cong., 2d Sess. (1978) (Statement of Gary Nelson).

40/ S. Rep. No. 96-1004. 96th Cong., 2d Sess. reprinted in 1980 U.S. Code Cong. & Ad. News 5986.

novo review with respect to involuntary retirement cases,[41] but retains the traditional Scroggins standard in voluntary cases. This interpretation preserves the necessary distribution of functions among departments; the executive finds facts within its area of expertise and the judiciary interprets law to determine whether the executive exceeded its authority.[42]

41/ Hearing Before the Subcomm. on Compensation & Employee Bnefits of the Comm. on Post Office & Civil Serv., 95th Cong., 2d Sess. (1978) (Report of Mrs. Spellman).

42/ In fact, the director of the Office of Personnel Management, Alan K. Campbell, concurred in this view. He stated that the amendment granted "expanded judicial review" or "full review" under 5 U.S.C. § 7703 for involuntary retirement determinations. Voluntary applications, however, would remain factually conclusive and reviewable only under the Scroggins standard. Id. (Statement of Alan K. Campbell, Director of Office of Personnel Management).

This court's well-established presumption in favor of reviewability must also bear on the interpretation of section 8347. The requirement is stated in varying ways but the message is clear: the evidence must be "clear and convincing" that Congress intended to restrict judicial review.[43/] The agency thus bears a "heavy burden of overcoming the presumption that Congress did not mean to prohibit all judicial review.[44/]

Without an unambiguous directive from Congress that it intended to preclude review, it is incumbent on the judiciary to interpret a statute to afford maximum protection to the individual rights at stake:

43/ See Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Barlow v. Collins, 397 U.S. 159, 167 (1976).

44/ Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

> [T]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.

Barlow v. Collins, 397 U.S. 159, 167 (1970).

In this instance, Congress has clearly intended to provide government employees with the full benefit of a fairly administered civil service system.45/ Congress did not intend to withdraw protection for federal employees by excluding the judiciary from reviewing errors of law in benefits determination cases.

45/ See 5 U.S.C. § 1101(s) which enumerates the policy of the Civil Service Reform Act. The Civil Service System was intended to protect applications and employees "against any infringement of due process, self-incrimination, or other constitutional rights," S. Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 2740.

If the "entire legislative scheme"[46] is analyzed, it becomes clear that Congress did not intend to foreclose judicial review. This Court has held that

> the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to the others. The right to review is too important to be excused on such slender and indeterminate evidence of legislative intent.[47]

Merely because Congress explicitly opened an unrestricted avenue to full judicial review for involuntary retirement cases based on mental condition, does not support a conclusion that by negative implication, review is foreclosed in all other cases. Rather, an interpretation

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46/ Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

47/ Id. (citing L. Jaffe, Judicial Control of Administrative Action, 357 (1965)).

that the amendment to section 8347 envisioned a Scroggins standard of review in voluntary retirement cases comports with the scheme constructed by Congress in the Administrative Procedure Act and with the separation of powers doctrine.[48/]

Furthermore, when Congress amended section 8347, it was presumed to have been aware of the judicial interpretation surrounding the statute. This Court in Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982), held that since a private cause of action had been continually implied in the Commodity Exchange Act by the courts, it was part of the "contemporary legal context" when Congress revisited and amended the

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48/ A recent Eleventh Circuit decision, dealing with the award of attorneys' fees in disability benefits appeals, reiterated this interpretation. See Scarborough v. Office of Personnel Management, 723 F.2d 801, n.11 (11th Cir. 1984).

statute. When Congress left the major stautory provisions intact, an intention to preserve that remedy was thereby evidenced. See Lorillard v. Pons, 434 U.S. 575, 580 (1978). In fact, when a court has made a reasonable interpretation of a statute which has been accepted by other courts and not rejected by Congress, courts in the same position must give such an interpretation persuasive if not conclusive weight. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1973).

The Scroggins standard for review is a reasonable interpretation which has been adopted in order to avoid the dangers that foreclosing all judicial review would present. Congress was certainly aware of the Scroggins construction and had the opportunity to withdraw this avenue of judicial review explicitly when it amended Section

8347. See Lorillard v. Pons, 434 U.S. 575 (1978). It did not. This Court should not now on the basis of a facial reading of the statute, assume that Congress intended to abrogate the right of judicial review as enunicated in Scroggins.

Unlike the "sharply drawn" ban on judicial review at issue in United States v. Erika, 456 U.S. 201 (1982), an interpretation of the statute in this case compels a different result. First, the statutory language itself has been interpreted in conflicting ways. Second, there is no "clear and convincing" evidence that Congress intended to foreclose review when it amended section 8347.[49/] In view of this

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49/ The Administrative Procedure Act requires there to be such evidence. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); Ortego v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975).

Court's presumption in favor judicial review, the Court of Appeals should have been reluctant to rule that section 8347 bars access to review.

Moreover, when Congress wishes to seek to bar all judicial review, even of questions of law, it knows how to express itself. For example, when Congress wished to limit review of denials of veterans' benefits, the review provision of the Veteran's Compensation Act, 38 U.S.C. § 211 (a), expressly made decisions by the veteran's administrator "final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." This language has consistently been held to bear no exceptions when the award or denial itself has been challenged. See, e.g., Martin v. United States, 197 Ct. Cl.

1062 (1972); Jump v. United States, 164 Ct. Cl. 453 (1964).[50/] Congress is thus well aware of how to draft legislation which would unambiguously foreclose review of the award determination itself.[51/] It has not done so in the case of retirement benefits. In the absence of such explicit Congressional language, this Court should not construe Section 8347 to preclude judicial review of erroneous executive determinations of significant questions of law.

50/ The constitutionality of denying judicial review of legal issues raised by a denial of Veteran's Benefits has not yet been tested.

51/ The review provision of the Federal Worker's Compensation Act, 5 U.S.C. § 8128, uses the same language to foreclose review. Again, this language has been held to make award determinations under the Act unreviewable. See DiPippa v. United States, 687 F.2d 14 (3d Cir. 1982); Calderon v. Tobin, 187 F.2d 514 (D.C. Cir. 1951), cert. denied, 341 U.S. 935 (1951); Blanc v. United States, 244 F.2d 708 (2d Cir. 1957), cert. denied, 355 U.S. 874 (1957).

II. CONGRESS MAY NOT OUST THE JUDICIARY'S JURISDICTION TO REVIEW ERRORS OF LAW COMMITTED BY EXECUTIVE OFFICIALS EMPOWERED TO ADMINISTER A CONGRESSIONAL PROGRAM.

A. The Doctrine Of Separation Of Powers Mandates That The Legislative And Executive Branches Not Be Able Unilaterally To Determine Issues Of Law And Fundamental Rights Without The Participation Of The Judiciary.

The Founders viewed undue concentration of governmental power as the principal threat to individual liberty.[52/] Their fear of the concentration of power found expression in a system of separate but equal branches: departments which could act together yet each be responsible for a different task within the republican

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52/ As Madison noted, "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether or one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

scheme.[53/] They envisioned that the judiciary, by acting as the law-declarer, would protect individual rights and ensure that the legislature did not exceed its authority and encroach on those rights. Hamilton described the judicial function over 200 years ago:

> [T]he courts were designed to be an intermediary body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

The Federalist No. 78 at 467 (A. Hamilton) (C. Rossiter ed. 1961).

When Congress created executive agencies, it was obliged to ensure that they did not disturb the limitations histori-

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53/ Our forebears knew that "the preservation of liberty requires that the three great departments of power should be separate and distinct." Id.

cally placed on the executive. Professor Monaghan, a legal historian, has pointed out that

> [h]ad the doctrine of separation of powers been understood from the beginning to bar any judicial control of administrative power, the constitutional scheme would have gone seriously awry at the outset . . . A conception of public administration free from judicial oversight would have damaged the fundamental axiom of limited government.

Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (Jan. 1983).

This Court has similarly recognized that it is the judicial forum[54/] in which questions of law affecting individual rights are to be finally adjudicated. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). It could not be otherwise since it is the judiciary which must

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54/ There is, in this case, no reason to consider whether Congress may look to Article I courts to perform aspects of the judicial function.

determine the limits of statutory grants of authority. See Stark v. Wickard, 321 U.S. 288, 310 (1944). Both the legislature and the executive are thus prevented from unilaterally imposing a "substantial deprivation" on an individual. I.N.S. v. Chadha, 103 S. Ct. 2764, 2789 (1983) (Powell, J., concurring); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 70 U.S. (4 Wall.) 277 (1866).

It is axiomatic, therefore, that when legal issues affecting significant interests are at stake, the judicial function cannot be wholly divested by legislation. The courts cannot be ousted of their responsibility to make independent determinations of constitutional challenges. See Crowell v. Benson, 285 U.S. 22, 64 (1932); See also, Johnson v. Robison, 415 U.S. 361 (1974) (construing limitation to permit

review of constitutional questions). Furthermore, the courts must be able to exercise their expertise in the interpretation of statutes. See Barlow v. Collins, 397 U.S. 159, 166 (1970). And finally, it is left to the judiciary to enforce an agency's compliance with its own regulations. See Service v. Dulles, 354 U.S. 363, 382-89 (1957). An effort by Congress to make certain administrative determinations of fact final and binding may pass muster, but a total preclusion of the judiciary's power to review cannot.

B. Retirement And Disability Benefits Constitute A Significant Interest Which Cannot Be Denied By Unilateral Executive Resolution Of Questions Of Law.

Retirement benefits are a form of deferred compensation. Virtually 7% of every dollar earned by a federal employee is withheld pursuant to 5 U.S.C. § 8334 to fund retirement or disability payments.

The right to receive the annuity vests upon retirement or the occurrence of the disability which makes retirement necessary.55/ While the right to receive a disability benefit may not be a vested property right, it is a significant fringe benefit of employment which may not be unlawfully withheld without access to judicial review. In fact, retirement benefits are listed along with salary increases, overtime, insurance benefits and travel allowances as "incidents of employee compensation" governed by title 5 of the

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55/ See American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 554 (D.C. Cir 1983). The court there held that a protected right to retirement benefits only vests when the federal employee actually retires. Two Kansas decisions, however, have held that the public employee has a vested, or nonforfeitable contractual interest in her pension plan prior to retirement. Slowinski, Pensions: Public Employee Pension Plans as Contractual Obligations Granted Constitutional Protection, 20 Washburn L.J. 169 (1980-81).

United States Code. Kizas v. Webster, 707 F.2d 524, 536 (D.C. Cir. 1983). "These provisions are the exclusive source of employees' compensation rights" and as such, employees have an indefeasible right to these incidents. Id.

Since the retirement annuity may be properly characterized as either deferred compensation or a contractual obligation, it is unconstitutional to foreclose judicial review of errors of law leading to its denial. That is, since the benefits rise to a cognizable interest, their protection must be judicially guaranteed against erroneous legal determinations by executive officials. Congress cannot make a contract or grant valuable employment rights and then legislate that the determination of legal issues affecting that benefit or right shall be within the exclusive domain of the executive. Such a

scheme would deny those significant rights the protection they are due and seriously undermine the judicial power of the United States.[56/]

If Congress may not vest Article III power in an Article I judge,[57/] and if Congress may not itself exercise the judicial function,[58/] or interfere with its

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56/ Whether the employee is disabled or not when retirement vests, the right to receive the benefit is still earned; the same amount has been deducted from every dollar earned. One may argue that the amount of the disability annuity which exceeds the amount paid into the employee's pension fund constitutes a gratuity. This proves too much, however, for the agency would then be forced to account for the amount of retirement benefits paid, dollar for dollar. It is more reasonable to consider the payments into the fund as insurance premiums guaranteeing the employee an income upon retirement, whether voluntary or required by disability.

57/ Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S.Ct. 2838 (1983).

58/ I.N.S. v. Chadha, 103 S. Ct. 2764, 2789, (1983) (Powell, J., concurring); Cummings v. Missouri, 70 U.S. (4 Wall.) 277 (1866).

performance,[59/] surely Congress may not eliminate the judicial function altogether by vesting executive officials with unreviewable power to commit errors of law in the administration of a Congressional program.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the decision of the Court of Appeals for the Federal Circuit be reversed.

Respectfully submitted,

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59/ United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).